Petition

81-1409

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IN THE

Supreme Court of the United States

NO. _____

SUPREME COURT OF THE UNITED STATES

_____ TERM

GWYNITH RAYMER and
MARILYN GILL — PETITIONERS

V.

UNITED STATES OF AMERICA — RESPONDENT

ON WRIT OF
CERTIORARI TO THE
UNITED STATES COURT
OF APPEALS FOR THE
SIXTH CIRCUIT

PETITION

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THE QUESTION PRESENTED FOR REVIEW

I. Whether the Federal Tort Claims Act permits actions against the United States based upon State theories of negligence *per se* for negligent failure to enforce federal regulatory standards.

LIST OF PARTIES

In the proceeding in the United States Court of Appeals for the Sixth Circuit, the defendant-appellant was the United States of America. The plaintiffs-appellees were Gwynith Raymer, Administratrix of the Estate of Ronald Latney Raymer, Deceased, and Marilyn Gill, Administratrix of the Estate of David R. Gill, Deceased.

Both plaintiffs-appellees listed above are petitioners herein.

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OPINIONS, ORDERS AND JUDGMENTS IN COURTS BELOW

The October 19, 1979 opinion of the district court was reported at 482 F.Supp. 432 and is reproduced herein at page A38. The October 9, 1981 opinion of the United States Court of Appeals for the Sixth Circuit in this case was reported at 660 F2d 1136. It is reproduced herein at page A1.

GROUNDS ON WHICH JURISDICTION OF THIS COURT IS INVOKED

The judgment sought to be reviewed and the opinion on which it is based were filed in the United States Court of Appeals for the Sixth Circuit on October 9, 1981. Upon plaintiffs' motion for rehearing, an order denying said motion was filed in that Court on November 4, 1981. The opinion and order are reproduced in the Appendix hereto, at pages A 1 and A 58, respectively.

Jurisdiction is conferred upon this Court by 28 U.S.C. § 1254(1).

STATUTES AND REGULATIONS INVOLVED HEREIN

28 U.S.C. § 1346. United States as defendant

* * *

(b) Subject to the provisions of chapter 171 of this title [28 USC §§ 2671 et seq.], the district courts, together with the United States District Court for the District of the Canal Zone and the District Court of the Virgin Islands, shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss or death caused by the negligent or wrongful act or omission of any employee of the government while acting within the scope of his office or employment, under circumstances where the

United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

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30 U.S.C.S. § 801. Congressional findings and declaration of purpose

Congress declares that--

(a) the first priority and concern of all in the coal mining industry must be the health and safety of its most precious resource--the miner;

(b) deaths and serious injuries from unsafe and unhealthful conditions and practices in the coal mines cause grief and suffering to the miners and to their families;

(c) there is an urgent need to provide more effective means and measures for improving the working conditions and practices in the Nation's coal mines in

order to prevent death and serious physical harm, and in order to prevent occupational diseases originating in such mines;

(d) the existence of unsafe and unhealthful conditions and practices in the Nation's coal mines is a serious impediment to the future growth of the coal mining industry and cannot be tolerated;

(e) the operators of such mines with the assistance of the miners have the primary responsibility to prevent the existence of such conditions and practices in such mines;

(f) the disruption of production and the loss of income to operators and miners as a result of coal mine accidents or occupationally caused diseases unduly impedes and burdens commerce; and

(g) it is the purpose of this Act (1) to

establish interim mandatory health and safety standards and to direct the Secretary of Health, Education and Welfare and the Secretary of the Interior to develop and promulgate improved mandatory health or safety standards to protect the health and safety of the Nation's coal miners; (2) to require that each operator of a coal mine and every miner in such mine comply with such standards; (3) to cooperate with, and provide assistance to, the States in the development and enforcement of effective State coal mine health and safety programs; and (4) to improve and expand, in cooperation with the States and the coal mining industry, research and development and training programs aimed at preventing coal mine accidents and occupationally caused diseases in the

industry.

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30 C.F.R. § 77.403 Mobile equipment; canopies and roll protection.

Forklift trucks, front-end loaders, and bulldozers shall be provided with substantial canopies and roll protection when necessary to protect the operator.

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30 C.F.R. § 77.1605 Loading and haulage equipment; installations

* * *

(k) Berms or guards shall be provided on the outer bank of elevated roadways.

STATEMENT OF THE CASE

History of Litigation

Plaintiffs brought this action under the Federal Tort Claims Act, 28 U.S.C. §§ 1346(b), 2671 et seq. (hereinafter FTCA) to recover for the deaths of their decedents. Plaintiffs alleged that the deaths were the result of negligent inspection and enforcement of coal mining regulations by government employees. The action was tried without a jury before the United States District Court for the Western District of Kentucky, Honorable Thomas A. Ballentine, Jr., presiding, beginning on November 30, 1978. On October 19, 1979, the Court rendered its judgment, supported by findings of fact and conclusions of law, awarding recovery to the

plaintiffs. The judgment was amended and made final on December 3, 1979. The United States appealed from that judgment, alleging that the "discretionary function" exception under the FTCA applied to the governmental activities in question, that there was no basis for liability under applicable state law, and that the facts did not support a finding of negligence. The United States Court of Appeals for the Sixth Circuit reversed the decision of the district court, holding that there was no basis for liability under Kentucky law. The Court held that only a "good Samaritan" theory could serve to make the United States liable, and that the undertaking and actions of the United States in this case did not

satisfy the requirements of that theory. Plaintiffs' subsequent motion for rehearing was denied.

This Petition followed.

STATEMENT OF PERTINENT FACTS

The plaintiffs' decedents, Raymer and Gill, were employed at the Sinclair Mine in Muhlenberg County, Kentucky, which mine was owned by Peabody Coal Company. On January 8, 1972, they were instructed to take a Caterpillar 988 front-end loader to a location known as the 4500 pit to help remove some disabled equipment. The decedents apparently became confused and took several roads not leading to the 4500 pit. They eventually drove the front-end loader across an elevated levee. The levee was commonly used as a roadway

by mine employees to reach a high wall work area.

Sometime later, the overturned 988 front-end loader was observed at the bottom of the levee slope by another mine employee who was returning to the shop area. When the 61,000 pound machine was righted, the decedents were found to have been crushed inside the cab. They were dead on arrival at a local hospital.

The inspection and enforcement activities complained of began on August 10, 1971. On that date, Bureau of Mines Inspector Wills issued a Notice of Violation to the Sinclair Mine for failure to have roll over protective structures (ROPS) installed on its mobile machinery as required by 30 CFR §

77.403. The violation was to be abated before September 13, 1971. Such a ROPS is "necessary" on mobile machinery which is used on terrain such that the machinery might tip over.

No notice of violation for failure to provide berms or guards on elevated roadways was written.

On September 13, 1971, Inspector Wills returned to the Sinclair Mine for a follow up inspection. Although the ROPS had not yet been installed, an extension of time until October 13, 1971 was granted. On October 13, November 10, and December 9, 1971 and again on January 6, 1972, further 30-day extensions of time for compliance were granted. At no time before the accident was a notice of violation for failure to

install berms or guards written.

The five successive 30 day periods in which to comply with the ROPS requirements of Section 77.403 were granted solely on the basis of a purchase order for ROPS from Peabody Mines, directed to no named supplier, listing the 16 pieces of equipment, including the 988 front-end loader, to be fitted with ROPS. On the basis of the purchase order, the inspectors concluded that the equipment was unavailable to the operators and that the extensions should be granted. The inspectors never inquired after and never saw any confirmation of that order.

Two days after the last extension was granted, the decedents went over the

edge of the levee roadway and died beneath the Caterpillar 988 front-end loader.

The District Court Decision

The Court agreed with the plaintiffs that the "discretionary function" exception of the FTCA did not apply to the government activities here, that the Federal Coal Mine Health & Safety Act of 1969 "imposes a duty on the defendant to see that mine safety regulations are vigorously and meticulously enforced," and that the government's negligent failure to enforce the regulations was a substantial factor in causing the two deaths. Judgment was awarded against the United States in favor of the decedent's representatives.

The Appellate Court Decision

The U. S. Court of Appeals for the Sixth Circuit reversed the decision of the district court on the ground that no basis for liability existed under Kentucky law. The Court concluded that only a theory of "good Samaritan" liability would suffice to make the United States liable, and that the elements of that theory were not met.

REASONS FOR GRANTING THE WRIT

The question presented for review, whether the FTCA permits actions against the United States based upon state theories of negligence per se for negligent failure to enforce federal regulatory standards, is a question over which the Courts of Appeals are in conflict.

In Griffin v. United States, 500 F.2d 1059 (3rd Cir. 1974), suit was

brought against the federal government for injuries caused by the ingestion of oral polio vaccine. The allegation was that an agency of the United States had negligently approved the particular batch of vaccine, in violation of certain federal regulations. The regulations required that the testing agency form a comparative analysis between the neurovirulence of the test batch and that of the standard reference strain, using five enumerated factors as evidence of neurovirulence. In holding that the United States was liable for injuries caused by the negligent inspection and approval of a particular batch of vaccine, the appellate court specifically approved the finding of the district court that the government's

conduct in releasing a batch of polio vaccine in violation of federal regulations was negligent per se under state law. The district court had analyzed the government's liability under this doctrine as follows: "Were DBS a private corporation charged by the law of Pennsylvania with releasing vaccine lots to the public only in conformity with 42 CFR 73.114(b)(1)(iii), liability would be clearly established under Pennsylvania law by the facts of this case." Griffin v. United States, 351 F.Supp. 10 (E.D. Pa. 1972).

The district court in this case concluded that the 1969 Act "imposes a duty on the defendant to see that mine safety regulations are vigorously and meticulously enforced." Raymer v. United

States, 482 F.Supp. 432, 436 (W.D. Ky. 1979). The Court found a breach of that duty, and described it as follows: "In the case at bar, the court finds that the affirmative act of perpetuating obviously hazardous conditions by granting unwarranted extensions to Peabody in the absence of any acceptable evidence that Peabody could not comply with the regulations amounts to actionable negligence for which the defendant is liable." Id. at 437. Thus, the Court made it clear that one basis of its judgment against the United States was the simple fact that the inspectors had violated federal regulations. This was in conformity with the holding of Griffin v. United States, supra.

In reversing the decision of the district court, the Sixth Circuit Court of Appeals considered the "good Samaritan" theory of liability to be the only avenue available for establishing the liability of the United States. The Court of Appeals specifically held that the 1969 Act did not create a private right of action by mine employees against the government, citing Blessing v. United States, 447 F.Supp. 1160, 1166 note 5 (E.D. Pa. 1978).

In the first place, the existence of a private right of action under an Act is not a prerequisite for use of the Act as a standard for measuring the conduct of a reasonable man. Thus, the Griffin court did not find it necessary to determine whether a private cause of

action arose under the legislation enabling polio vaccine inspection regulations. It is state law which establishes the right of action, and Kentucky law, as argued at length by the plaintiffs in their brief to the Court of Appeals, has recognized and applied the doctrine of negligence per se to violation of administrative regulations. In Lomayestewa v. Our Lady of Mercy Hospital, 589 S.W.2d 885 (Ky. 1979), the Court held that the issue of negligence of the defendant hospital should not have been submitted to the jury where there was a violation of a state administrative regulation relating to the safety of hospitals, where the plaintiff was one of the class of persons intended to be protected by that regulation, and

the event causing her injuries was one the regulation was designed to prevent.

Such a doctrine is not one of "strict liabilty without fault", which cannot be imposed upon the United States under the Federal Tort Claims Act. Rather the doctrine merely sets up a statutory or regulatory standard of care, the violation of which may lead to liability. This is a traditional negligence claim. Plaintiffs did not require, nor should they be limited to, a theory of "good Samaritan" liability. The duties were imposed by Congress and ran directly from the inspectors to the miners.

In the second place, the Court of Appeals was incorrect in stating, without argument upon the issue, that no

private right of action was created by the 1969 Act.

This error was occasioned partly through reliance upon Blessing v. United States, supra.). In Blessing, the district court found that the legislative history of the Occupational Safety & Health Act of 1970 revealed an intent by the Congress to deny a private cause of action by an injured employee against the United States. There, a specific provision granting a private right of action was deleted before passage of the Act. In this case, the legislative history does not reveal Congress' intent one way or the other regarding a private cause of action, and other factors must be examined.

In Cort v. Ash, 433 U.S. 66, 95 S.Ct. 2080, 45 L.Ed.2d 26 (1975), this court enumerated four factors for courts to consider in determining whether private rights of action are implicit in statutes which do not expressly provide for such action.

> "In determining whether a private remedy is implicit in a statute not expressly providing one, several factors are relevant. First, is the plaintiff 'one of the class for whose especial benefit the statute was enacted,' . . .--that is, does the statute create a federal right in favor of the plaintiff? Second, is there any indication of legislative intent, explicit or implicit, either to create such a remedy or to deny one? . . . Third, is it consistent with the underlying purposes of the legislative scheme to imply such a remedy for the plaintiff? . . . And finally, is the cause of action one traditionally relegated to state law, in an area basically the concern of the States, so that it would be inappropriate to infer a cause of action based solely on federal law? (citations omitted)

Here, the decedent miners clearly were members of the class for whose especial benefit this statute was enacted. Mine safety acts are specifically directed at the well-being of the miners, not the public at large.

Second, the legislative history is silent as to private causes of action for negligent failure to enforce the Act. In this respect, the case is similar to that of Chumney v. Nixon, 615 F.2d 389 (6th Cir. 1980), where the Court found that the legislative history gave no indication either for or against a private remedy. That Court went on to analyze the pertinent statute in terms of the remaining factors found in Cort v. Ash, supra, and concluded that a private remedy was implicit. Such silence

is therefore not a bar to the existence of a private action.

Third, it is consistent with the underlying purposes of the legislative scheme to imply such a remedy. Administrative mechanisms were put in place whereby miners could participate in the enforcement of the Act and could review the actions of the Secretary in enforcing the Act. Under the 1969 Act, the mine employees had significant enforcement function. Under 30 U.S.C. § 813 (1969) (Act § 103), representatives of the miners had a right to obtain immediate inspection of the mine and to accompany the Secretary's inspectors on any inspection. A copy of any notice, order or decision given to an operator was to be mailed by the

Secretary to a representative of miners in the affected mine, 33 U.S.C. § 817 (1969) (Act § 107). Further, representatives of the miners had the right to input at any administrative hearing challenging an order issued to an operator or any modification or termination of such an order, 33 U.S.C. § 815 (1969) (Act § 105). Additionally, under 33 U.S.C. § 816 (1969) (Act § 106), a miner could petition as a person aggrieved by an order or decision of the Secretary for judicial review by a Circuit Court of Appeals.

Congress, by involving the miners in the enforcement process, has established without cavil that the miners were to have a right to have the Act enforced. The above provisions

reflect the awareness of Congress that the enforcement actions of the Secretary were of utmost concern to miners, since their safety and lives were the quantities to be protected. The miner's right to have the Act enforced could be asserted on appeal of decisions by which the miners were aggrieved.

If the right existed and could be asserted administratively to enforce the inspectors to live up to Congress' intent, then an action by which the miner can be compensated for failure to so enforce the Act is consistent with the express intent of the Act and the administrative machinery put in place. A private remedy is simply a mechanism for post-failure enforcement of the Act's demands for stringent enforcement.

The intention was to provide checks by the miners on the vigorous enforcement of the Act by the Secretary.

The legislative history of the 1969 Act clearly shows that Congress intended to place new duties and responsibilities upon the Secretary, who was to vigorously enforce the Act. See House Committee on Education and Labor, 91st Congress, 2d Session, Legislative History of the Federal Mine Health and Safety Act of 1969 (Committee Print 1970).

The Senate Committee, in reporting its original bill, noted that "[m]any [hazards] are due to bad practices and a failure on the part of many, including the federal government, to act vigorously years ago to change them." Id. at p. 13.

As a result the Committee was determined to improve the "notably unimpressive" record of the Department of Interior and Bureau of Mines in improving the health and safety of miners.

The Committee thought that health and safety had been the "stepchild" of the Bureau, and the primary interest of the Bureau was mineral production, including coal. Id. at p. 43. Many personnel of the Bureau were thought to be lethargic, and more oriented toward industry than toward the health and safety of miners. The Committee noted that there had been some change since the Farmington, West Virginia, mine disaster in 1968, but the Committee was still concerned that not enough atten-

tion had been given by officials of the Department to insuring that the health and safety functions would be buttressed. "The expanded authority and responsibility found in this bill demands that these functions be substantially expanded and improved." The Committee said that it intended "to do whatever it can to assure that greater efforts will be made to bring redirection to those in the Bureau were more production oriented than health and safety oriented. The Committee's bill, as effective as it may be, will never achieve adequate health and safety for the miner unless the Department acquires new perspective and focus concerning the importance of the miner and unless there is strong and vigorous administration by

the Department." Id.

The Act did not provide for any administrative delay which might be required for the Secretary to propose, revise, consider, and finally promulgate regulations. Rather, interim standards were made a part of the Act. It was the intent of the Act to impose immediate standards, and to allow the Secretary to provide more protection upon later regulations.

Senator Schweiker in his comments at the debate of this bill noted that "[the Act] will impose on these inspectors some duties they would not otherwise have had. However, I feel that just as Congress in this bill is imposing more stringent safety requirements on mine operators and our indivi-

dual miners, Congress should likewise place some additional duties on the executive branch agency charged with implementing these laws. The effort to make mines safer and more healthful should be a united effort by the federal government, the mine operators and the miner himself." Id. at p. 253. Recent coal mine disasters have emphasized the need for strict enforcement of safety regulations.

One of the purposes of the bill then, was to force the executive branch to undergo a complete turn-around and change of focus from its prior enforcement efforts. It is completely consistent with these purposes to imply a private cause of action for failure of the Secretary to carry out the new

requirements of Congress.

Fourth, the area is not one traditionally relegated to State law: federal efforts at mine safety had superseded State efforts, except where the State provided greater protection than the federal regulations. The safety of a nation's miners--"the industry's most precious resource"--had long ceased to be of primarily State concern. Indeed, the failure of the States to act effectively had prompted the federal efforts.

Absent any indication from the legislative history that private remedies were not intended, courts are free to conclude, based upon other factors, that such a private cause of action is indeed implied.

The implication of such a private right

of action by the Congress further supports the contentions of the plaintiffs that specific duties did in fact run from the inspectors to the miners, and that the inspectors' actions should be measured against the yardstick of the federal regulations.

The Court of Appeals in this case in fact recognized that the United States "has undertaken to render services to others in adopting the 1969 Act," and further recognized that the mine inspectors had duties. However, the Court of Appeals concluded that such duties only had significance in the context of the "good Samaritan" theory, and refused to find liability on the basis of negligence per se.

The Court of Appeals also referred

to the duties of the inspectors as "secondary", implying that States would not base liability on a breach of such secondary duties. However, at the time of this accident, one guilty of a breach of such secondary duties was clearly liable under Kentucky law to one injured thereby, and the secondarily liable party had rights of indemnity against another, even an employer, who was primarily liable. Kentucky Utilities v. Jackson County Rural Electric Cooperative, 438 S.W.2d 788 (Ky. 1969).

Since the Sixth Circuit Court of Appeals has denied plaintiffs' arguments that liability may arise under the Federal Tort Claims Act by way of application of a State's theory of negligence per se, and since this decision is in

direct conflict with the Third Circuit case of Griffin v. United States, supra, this Court should address and resolve the conflict between these courts of appeals.

CONCLUSION

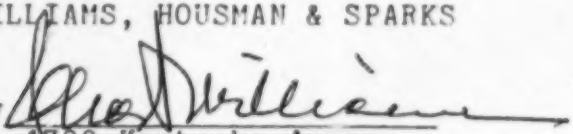
In summary, the Court should examine the question presented for review because the Sixth Circuit Court of Appeals has denied the plaintiffs a cause of action based upon the well-supported Kentucky theory of negligence per se for negligent failure to inspect and enforce federal regulations. The Sixth Circuit's refusal is in direct conflict with the decision of another Court of Appeals, Griffin v. United States, supra.

In considering this question, the Court should carefully examine the legislative history of the 1969 Act, which history clearly indicates the duties and responsibilities which Congress intended to place upon the Secretary.

In the last analysis, this Court should reverse the decision of the Court of Appeals and order that the decision and judgment of the District Court be reinstated.

Respectfully submitted,

WILLIAMS, HOUSMAN & SPARKS

By 

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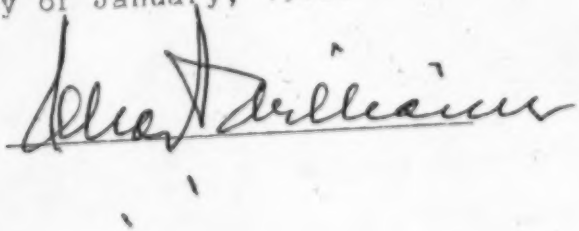
CERTIFICATION

I hereby certify that three copies of this Petition have been served upon all parties required to be served by Rule 28 of this Court by mailing the same, first class postage prepaid as follows: Solicitor General, Department of Justice, Washington, D.C. 20530. This the 26th day of January, 1982.



Appendix

APPENDIX

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October 9, 1981, opinion of the United States Court of Appeals for the Sixth Circuit in No. 80-3033 . . . . . A1

October 19, 1979, Memorandum Opinion of the United States District Court for the Western District of Kentucky, in No. C 76-0119-L (B), (Owensboro Civil Action No. 2759) A38

November 4, 1981, Order Denying Petition for Rehearing in No. 80-3033 . . . . . A58

No. 80-3033
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

GWYNITH RAYMER, Administratrix of the Estate of Ronald Latney Raymer, Deceased; and Marilyn Gill, Administratrix of the Estate of David R. Gill, Deceased,
Plaintiffs-Appellees,

v.

UNITED STATES OF AMERICA,
Defendant-Appellant.

APPEAL from the United States District Court for the Western District of Kentucky.

Decided and Filed October 9, 1981.

Before: EDWARDS, Chief Judge; LIVELY and KEITH, Circuit Judges.

LIVELY, Circuit Judge. This appeal requires us to decide a question previously reserved by the court: Whether an action lies against the government under the Federal Tort Claims Act for alleged negligence of employees of the Bureau of Mines of the Department of

Interior in performing inspection activities required by the Federal Coal Mine Health and Safety Act of 1969, 30 U.S.C. § 801 et seq.[1] (the 1969 Act).

[1]The 1969 Act was superseded by the Federal Mine Safety and Health Amendments Act of 1977 which, inter alia, placed responsibility for enforcement of the Act in the Department of Labor. 30 U.S.C. § 802(a) (1976 ed., Supp. II).

See Collins v. United States, 621 F.2d 832, 833 (6th Cir.), cert. denied, 101 S.Ct. 363 (1980).

I

The plaintiffs are the personal representatives of Ronald Latney Raymer and David R. Gill who died in an accident while working at a strip mine of Peabody Coal Company in Muhlenberg County, Kentucky on January 8, 1972. Raymer and Gill were directed by a supervisor to take a "front end loader" to a distant part of the mine for the purpose of

assisting in the removal of another vehicle which had become stuck. Raymer and Gill never arrived at their destination. Sometime later the front end loader was found overturned at a point 27 feet below an elevated "levee road." Both occupants were fatally crushed. There were no witnesses to the accident. The levee road was owned by the Tennessee Valley Authority, but was used by Peabody employees in going from one part of the strip mine operation to another.

The complaint of each plaintiff charged negligent inspection and negligent enforcement of the 1969 Act and "other negligence on the part of Bureau of Mines personnel ..." as the basis for recovery under the Federal Tort Claims Act, 28 U.S.C. § 1346(b) and § 2671 et seq. (The FTCA). As developed in discov-

ery and at trial the negligence charged consisted of the unwarranted granting of extensions of time to Peabody for the correction of one violation of the 1969 Act found by an inspector and the failure to discover and cite a Bureau of Mines inspector issued a citation to Peabody for violation of 30 C.F.R. § 77.403 (1971) which required roll over protection systems (ROPS) on mining equipment when necessary to protect the operator. This citation referred to front end loaders and bulldozers. The front end loader involved in the accident was not equipped with roll bars or other ROPS. Thereafter, this inspector and another one issued successive extensions of time for compliance with the August 10th citation. The final extension was granted on January 6, 1972, two days before the

fatal accident. The plaintiffs also charged that the inspectors were negligent in not citing Peabody for failure to provide berms and guardrails on the elevated levee road, a claimed requirement of 30 C.F.R. § 77.1605(k) (1971).

The district court rendered two decisions in this case. In the first it entered an order and memorandum opinion denying the government's motion for summary judgment. Raymer v. United States, 455 F.Supp. 165 (W.D. Ky. 1978). The memorandum opinion foreshadowed the later decision on the merits with its finding that, "in assuming the duty to inspect and regulate mining operations, the U.S. formulated a policy, the negligent execution of which will render it liable." Id. at 168. In granting summary judgment for wrongful death in favor of both plain-

tiffs following trial the district court concluded that the 1969 Act "imposes a duty on the defendant to see that mine safety regulations are vigorously and meticulously enforced." Raymer v. United States, 482 F.Supp. 432, 436 (W.D. Ky. 1979). The breach of this duty which resulted in liability was stated thus: "In the case at bar, the Court finds that the affirmative act of perpetuating obviously hazardous conditions by granting unwarranted extensions to Peabody in the absence of any acceptable evidence that Peabody could not comply with the regulations amounts to actionable negligence for which the defendant is liable." Id. at 437.

The reference to the absence of evidence of Peabody's inability to comply with the August 10th citation relates to

a disputed issue of fact. In granting the extensions the inspectors apparently relied on their knowledge that promulgation of the regulations had created a great demand for ROPS and that mine operators were experiencing difficulty in acquiring the kits used in equipping their machinery and vehicles with roll over protection. Further, there was some evidence that Peabody had placed an order for a kit to be used on the front end loader. Nevertheless, the finding of the district court on this factual issue is not clearly erroneous, and it is treated as correct on appeal. Rule 52(a), Fed.R.Civ.P. The district court did not base its liability holding on any finding or conclusion with respect to the absence of berms and guardrails along the levee road though their absence was found,

along with the absence of ROPS, to be a "substantial factor" in the deaths of the two employees. 482 F.Supp. at 435. The parties disagreed on whether such protection was required for the levee road or whether the regulation applied only to "haulage" roads. The district court did not resolve this issue.

II

A.

The government makes three arguments on appeal. First, it contends that it is not liable to the plaintiffs because regulatory enforcement activities of mine inspectors constitute "discretionary functions." This argument is based on an exception contained in the FTCA, 28 U.S.C. § 2680(a):

> The provisions of this chapter and section 1346(b) of this title shall

not apply to--

> (a) Any claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused.

The second argument is that regulatory enforcement activities do not give rise to "an actionable tort duty" cognizable under the Federal Tort Claims Act. In the third place the government argues that assuming a duty existed, the court erroneously concluded that a breach of that duty was proven in this case. We examine the second argument, which appears dispositive.

B.

The two provisions of the FTCA which

establish jurisdiction in the district court for actions against the United States based on negligence of its agencies and employees are 18 U.S.C. §§ 1346(b) and 2674.[2] As shown by the texts

[2] Section 1346(b) provides:

> (b) Subject to the provisions of chapter 171 of this title, the district courts, together with the United States District Court for the District of the Canal Zone and the District Court of the Virgin Islands, shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

The pertinent portion of § 2674 provides:

> The United States shall be liable, respecting the provisions of this

> title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances, . . .

reproduced in the footnote, both sections limit liability of the United States to those circumstances in which a private individual would be liable under like circumstances is to be made "in accordance with the law of the place where the act or omission occurred." § 1346(b).

The district court examined the 1969 Act and concluded that it imposed a duty upon the government to enforce its provisions "meticulously" and that the granting of unwarranted extensions of its remedial order constituted a breach of this duty. The court further concluded that under Kentucky law a private individual would be liable for a similar breach of duty under like circumstances. Though the district court relied upon the

language of the 1969 Act in finding for the plaintiffs, it did not hold that there is a private right of action under the Mine Safety Act. Rather, the 1969 Act was held to define the duty of the government and liability for the breach of this duty was founded on the Federal Tort Claims Act. We agree that the 1969 Act did not create a private right of action by mine employees against the government. See Blessing v. United States, 447 F.Supp. 1160, 1166 n. 5 (E.D. Pa. 1978).

C.

The main thrust of the government's argument is that there is no liability under Kentucky law for negligence in the conduct of regulatory inspection and enforcement activities. The government contends that even where a federal

statute or regulation imposes a specific duty on federal employees, there is no liability to beneficiaries of the statute or regulation under the FTCA if state law imposes no similar obligation or duty on private persons. The government maintains that the district court actually found liability on the basis of the requirements of the 1969 Act rather than on the basis of any state-created duty.

D.

The plaintiffs argue that Kentucky recognizes the "good Samaritan" doctrine in the context of a third-party inspection. Under this doctrine one who undertakes an inspection and in doing so finds a danger has an obligation either to abate the danger or to see that the owner of affected premises does so. Thus they contend, once the government assumed the

task of inspecting coal mines, with enforcement powers to correct violations of safety rules and regulations, it was required to act with reasonable care and is liable where it failed to do so. As did the district court, the plaintiffs rely principally on the decision of the Kentucky Court of Appeals (then the State's highest court) in Haddad v. Louisville Gas & Electric Co., 449 S.W.2d 916 (Ky. 1970).

III.

A.

It is clear that the government may not avoid liability under the FTCA on the ground that the activity giving rise to the claim involved "uniquely governmental" functions. Congress did not predicate liability on "such a completely fortuitous circumstance [as]

the presence or absence of identicl private activity." Indian Towing Co. v. United States, 350 U.S. 61, 67 (1955) (footnote omitted); Rayonier, Inc. v. United States, 352 U.S. 315, 319 (1957). Thus it is not determinative that private individuals do not engage in regulatory inspection and enforcement activities. If there are similar activities whose negligent performance by a private individual under like circumstances results in liability under applicable state law, a cause of action exists under the Federal Tort Claims Act.

In permitting suits by federal prisoners under the FTCA the Supreme Court held in United States v. Muniz, 374 U.S. 150, 159 (1963), "the Government's liability is no longer restricted to circumstances in which government bodies

have traditionally been responsible for misconduct of their employees." This echoes the earlier holding in Indian Towing, supra, that the Federal Tort Claims Act "cuts the ground from under" the doctrine of sovereign immunity. 350 U.S. at 65. Thus decisions denying recovery against states and their political subdivisions on grounds of sovereign immunity are not germane to FTCA cases. The pertinent inquiry is whether state law makes a private individual, not the state or other political entity, liable for an employee's failure to exercise due care under like circumstances.

B.

In Haddad v. Louisville Gas & Electric Co., supra, the Kentucky court held that a public utility had a "duty to do something protective" when its employe

found a highly dangerous concentration of carbon monoxide while inspecting a floor furnace inside the residence of a customer. 449 S.W.2d at 918. The court made clear that the gas company had no duty to make an inspection or to "police" appliances generally but that the "duty grows out of an inspection which the company has chosen to make." Id. The plaintiffs argue that Haddad establishes the principle that a private individual who undertakes an inspection of the premises of another is liable under Kentucky law for failing to abate a dangerous condition discovered during the inspection if that condition results in injury or damage.

We believe the plaintiffs read too much into Haddad. Every pertinent authority cited by the Kentucky court in

its opinion emphasized the existence of a highly dangerous condition which would not be readily apparent to a member of the general public. Bruce v. Alley, 391 S.W.2d 678 (Ky. 1965), concerned a furnace installer's liability for failing to vent a furnace in accordance with state safety standards. The plaintiff suffered carbon monoxide poisoning. In concluding that a jury issue was presented the court noted that natural gas is a "dangerous substance requiring a high degree of care" and that it can harm without being perceived. Id. at 680. In Current v. Columbia Gas Co., 383 S.W.2d 139, 141 (Ky. 1964), the court remarked that carbon monoxide is colorless and odorless in concluding that the issue of a gas company's liability for cutting gas into an unvented space heater should be sub-

mitted to a jury. The earlier case of Smith's Adm'x v. Middlesboro Electric Co., 174 S.W. 773 (Ky. 1915), discussed at great length the nature of electricity and that it is little understood by most people. "It cannot be seen, and can only be felt, and when the effects of it are felt, it usually is too late for the victim to escape its more deadly effects." Id. at 778. In addition to the foregoing cases, the Kentucky court relied upon a quotation from A.L.R. on the duty of a gas company which undertakes an inspection of the pipes or appliances of a consumer.

This analysis indicates to us that Haddad would not be applied as broadly as the plaintiffs contend. The humane rule which Haddad establishes is that when members of the general public enlist the services of specially qualified persons

to determine whether potentially dangerous substances do in fact constitute a danger, the persons so engaged have a duty to take some steps to abate any dangers found to exist. Haddad and the authorities upon which it was based all have as underlying premises danger from a substance whose presence is not obvious to a layman, an undertaking to inspect or install by one having superior knowledge of the dangerous substance, and reliance on the expertise of the person who assumes the undertaking. We must look beyond Haddad.

C.

Grogan v. Commonwealth, 577 S.W.2d 4 (Ky.), cert. denied, 444 U.S. 835 (1979), is heavily relied upon by the government. That case arose from the tragic fire which occurred at the Beverly Hills

Supper Club in a Kentucky suburb of Cincinnati on May 28, 1977. Suits were filed on behalf of the victims of the fire in which it was sought to hold both the city in which the club was located and the state liable for failure to enforce laws and regulations which established safety standards for the benefit of the public. The Supreme Court of Kentucky affirmed dismissal of the actions holding that "a government ought to be free to enact laws for the public protection without thereby exposing its supporting taxpayers (including, of course, those yet unborn) to liability for failure of omission in its attempts to enforce them." Id. at 6. This conclusion was not based on sovereign immunity, which had previously been abolished in Kentucky, but on the fact

that no cause of action for such an omission by a governmental agency had ever been recognized in Kentucky.

Throughout the Grogan opinion the court made it clear that it was not considering whether a private individual would be liable under similar circumstances:

> Though appellants indulge the facile assumption that under similar circumstances a private individual would be liable at common law, we do not believe that the common law, as applied to individuals, offers any reasonably comparable analogy.

577 S.W.2d at 5, and:

> Hence it is that in delineating the areas and extent of public responsibility we are dealing with a subject quite apart and different from the word of individual and corporate relationships. There being no reasonable basis for comparison, there can be no discrimination.

Id. at 6. If the FTCA made the federal government liable to the same extent that

the state of occurrence makes itself and its political subdivisions liable, then Grogan and Commonwealth v. Brown, 605 S.W.2d 497 (Ky. 1980), also relied upon by the government, would appear dispositive. However, since liability under the federal act is dependent upon liability of private individuals under state law, these decisions are not conclusive.

D.

A decision under Kentucky law which appears at first glance to support the plaintiffs is Bryant v. Old Republic Insurance Co., 431 F.2d 1385 (6th Cir. 1970). There a divided court held that a workmen's compensation insurer did not share the employer's immunity from an action in tort under a Kentucky statute

which permitted an injured employee to sue "some other person than the employer" who was legally liable under the circumstances. The claim was based on a negligent inspection, or failure to inspect by the insurance company. Nevertheless, Bryant was decided on a motion to dismiss and the court did not attempt to define what circumstances would make the "other person" liable. Both the majority and dissenting opinions acknowledged finding no Kentucky decisions on point.

In a case where the claim was identical to the one in Bryant, but which had been tried on its merits, the Fifth Circuit concluded there could be no recovery against the compensation carrier. See Davis v. Liberty Mutual Ins. Co., 525 F.2d 124 (5th Cir. 1976). The court was

required to apply Alabama law in Davis. In doing so the court assumed that Alabama would follow Restatement of Torts, Second, § 324A in formulating a cause of action based on negligent inspection. Section 324A requires the establishment of at least one of three circumstances before there can be recovery by a third person for a negligent undertaking of this kind:

> One who undertakes, gratuitously or for consideration, to render services to another which he should recognize as necessary for the protection of a third person or his things, is subject to liability to the third person for physical harm resulting from his failure to exercise reasonable care to protect his undertaking, if
>
> (a) his failure to exercise reasonable care increases the risk of such harm, or
>
> (b) he has undertaken to perform a duty owed by the other to the third person, or
>
> (c) the harm is suffered because

> of reliance of the other or the third person upon the undertaking.

The Davis court found that none of the three requirements for liability had been established.

IV.

A.

There appears to be no Kentucky case which deals directly with the issue before us, and we have found no Kentucky case dealing with a truly analogous situation. Though Haddad is somewhat analogous, as we have pointed out, its particular features (and those of the cases it relied on) lead us to conclude that it did not announce a general rule of liability. Thus we are required to decide the case as we believe the Supreme Court of Kentucky would if the identical issue were presented to it.

We have found no Kentucky case spec-

ifically adopting Restatement of Torts, Second, § 324A, though it has been cited with apparent approval.[3] The require-

[3]See Rigsby v. Brighton Engineering Co., 464 S.W.2d 279, 282 (Ky. 1970) (Reed, J., concurring). See also Comment d in Reporter's Notes to § 324A which is based on Murray v. Cowherd, 148 Ky. 591, 147 S.W. 6 (1912).

ments of the section are logical and appear to reflect accepted principles of duty and tort liability. We believe the Kentucky court would impose essentially the same requirements for recovery, whether or not it adopted the precise formulation of the Restatement. Referring to the three tests of § 324A, it is clear that the extensions granted by the mine inspectors in the present case did not increase the danger of harm from operating the front end loader without ROPS. It merely permitted the

continuation of an existing risk. We also conclude that the inspectors did not undertake to perform a duty owed by Peabody to the decedents and that there was no justifiable reliance by the decedents or Peabody on the mine inspectors' acts or omissions.

B.

In Indian Towing Co., supra, 350 U.S. at 64-65, the Supreme Court found that Congress intended to include liability under the "good Samaritan" doctrine within the scope of the Federal Tort Claims Act. The Court applied this doctrine to the facts before it in the following language:

> The Coast Guard need not undertake the lighthouse service. But once it exercised its discretion to operate a light on Chandeleur Island and engendered reliance on the guidance afforded by the light, it was obligated to use due care to make cer-

> tain that the light was kept in good working order; and, if the light did become extinguished, then the Coast Guard was further obligated to use due care to discover this fact and to repair the light or give warning that it was not functioning. If the Coast Guard failed in its duty and damage was thereby caused to petitioners, the United States is liable under the Tort Claims Act.

350 U.S. at 69 (emphasis added). The key to liability in the Supreme Court's definition appears to be that reliance be engendered by one who undertakes a service. Reliance was clearly one basis of the Kentucky court's decision in Haddad, supra, where the owner apparently suspected the presence of gas in her home, but requested the utility which furnished gas to inspect her property and determine whether a dangerous condition actually existed. Reliance was justified in both instances. In Indian Towing Co. the Coast Guard was the only person or

entity rendering the service; in Haddad the gas company, because of its expertise, became the responsible party, at least to the extent of foreseeable consequences, once it undertook the inspection. Compare Satterly v. Stiles, 409 S.W.2d 820, 824 (Ky. 1967), ("Without undertaking an exploration of the so-called 'good Samaritan' principles, it is plain that appellant did not rely on the alleged assurances of the Martin driver for her entrance into the curb lane.").

In the present case such reliance was neither pled nor proven. The front end loader was not shown to have any defects which were known to the inspectors but hidden from the decedents and Peabody. There was no showing that either decedent or Peabody relied on the extensions granted by the federal inspec-

tors in concluding that it was safe to use the vehicle without ROPS.

Furthermore, reliance would not have been justified in view of the scheme of the 1969 Act. Under the 1969 Act the role of the Bureau of Mines in promoting mine safety was strictly secondary. The Act provided that "the operators of such mines with the assistance of the miners have the primary responsibility to prevent the existence of such [unsafe and unhealthful] conditions and practices in such mines. . . ." 30 U.S.C. §801(e). The purpose of the Act was declared to be the establishment of mandatory health and safety standards for coal mines and "to require that each operator of a coal mine and every miner in such mine comply with such standards. . . ." § 8012(g) (emphasis added in both quotations). In

the face of this language which completely negates the idea that responsibility for mine safety has been shifted to the federal government, it would have been unreasonable to rely on the mere failure of federal inspectors to require immediate abatement of the ROPS violation as an indication that the vehicle was safe. Our discussion of the provisions of the 1969 Act demonstrates that the second alternative basis of liability under § 324A, "he has undertaken to perform a duty owed by the other to the third person," was not satisfied. The mine operator's duty to the miners to maintain safe conditions was unaffected by the 1969 Act and the mine inspectors did not assume this duty. In the absence of a Kentucky rule establishing private liability in an analogous case we conclude

that the actions of the inspectors in the present case did not create liability under the Federal Tort Claims Act.

C.

Our conclusion is supported by cases from other courts. In United Scottish Insurance Co. v. United States, 614 F.2d 188 (9th Cir. 1979), the court concluded that reliance is an integral part of the good Samaritan doctrine as applied in FTCA cases. The court also found that when a governmental agency carries out inspection functions pursuant to a statute or regulaion it "does not purport to relieve other actors of the primary duty to see that the underlying activity is accomplished safely or consistently with some other important public policy." Id. at 193. The court summarized its holding as follows:

> We thus hold that in the absence of a demonstration that the applicable state law requirements of the good samaritan doctrine are satisfied in any given case, the government may not be held liable pursuant to the Act for negligence in inspection of private activities or property, although federal statutes or regulations direct that government employees undertake the inspection activity.

614 F.2d at 195 (footnote omitted).

In Clemente v. United States, 567 F.2d 1140 (1st Cir. 1977), cert. denied, 435 U.S. 1006 (1978), the court held that failure of FAA employees to advise the crew and passengers of a chartered plane that the proposed flight was illegal imposed no liability under the FTCA. The court found it significant that there was no indication that the passengers or any one else relied on the FAA in this case. This lack of reliance was contrasted with the justifiable reliance which crews and passengers place on air traffic

controllers. Id. at 1147-48. The court also noted that the pilot is responsible for a safe flight and that an administrative directive relied upon by the plaintiffs had not shifted the burden of potential tort liability to the government in view of "this primary locus of responsibility." Id. at 1149.

We are aware of opinions in which district courts have held that § 324A of Restatement of Torts, Second, has no application in Federal Tort Claims Act cases which rely on negligence of mine inspector. See Kilpatrick v. United States, No. CA 79-P-1106-J (N.D. Ala. March 19, 1980); Taylor v. United States, No. 81-0018-0(G) (W.D. Ky. August 7, 1981). However, we conclude that the United States has undertaken to render services to others in adopting the 1969

Act, and that cases of this kind are properly resolved by applying the "good Samaritan doctrine" as the Supreme Court did in Indian Towing. Reliance is an essential element of that doctrine.

D.

Our conclusion is that the Kentucky courts would not hold a private party who conducted an inspection pursuant to the terms of the 1969 Act liable under the circumstances developed by the evidence in this case. The duty of the mine inspectors was a secondary one. The mine operator and miners were primarily responsible for the safe operation of the mine. In the absence of a shifting of this responsibility, there could be no justifiable reliance by an individual miner on acts or omissions of the inspectors in a situation where the danger was

not concealed or of such a nature that it could be recognized only by specially qualified persons.

Our conclusion that a private individual in Kentucky would not have been liable under the circumstances of this case makes it unnecessary to consider the other issues raised by the parties.

The judgment of the district court is reversed, and the cause is remanded with directions to dismiss the complaints.

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF KENTUCKY
AT LOUISVILLE

GWYNITH RAYMER, Administratrix
of the Estate of RONALD LATNEY
RAYMER, Deceased
Plaintiff

v.

UNITED STATES OF AMERICA
Defendant

and

MARILYN GILL, Administratrix of
the Estate of DAVID R. GILL,
Deceased
Plaintiff

v.

UNITED STATES OF AMERICA
Defendant

No. C 76-0119-L(B)
(Owensboro Civil Action No. 2759)

MEMORANDUM CONTAINING FINDINGS OF FACT
AND CONCLUSIONS OF LAW

Entered October 19, 1979

This matter was heard by the Court without a jury on November 30 and December 1, 1978. It is now before the

Court for findings of fact, conclusions of law and entry of a judgment.

FINDINGS OF FACT

(1) Plaintiff, Gwynith Raymer, is the duly qualified administratrix of the estate of Ronald Raymer, deceased, and Marilyn Gill is the duly qualified administratrix of the estate of David R. Gill, deceased. (Stipulation with respect to facts, exhibits and certain other matters filed November 30, 1978 [hereinafter "Stipulation"], Para. 11.) Plaintiffs' decedents met their deaths from injuries sustained when a 988 front end loader overturned on January 8, 1971 (Stipulation, Para. 7). Ronald Raymer's date of birth was March 17, 1951, and his funeral expenses amounted to $3070.00 (Stipulation, Para. 10). David Gill's date of birth was January 21, 1945, and

his funeral expenses were $1656.75 (Stipulation, Para. 9). No claim is asserted by either plaintiff for pain and suffering prior to death of her intestate (Stipulation, Para. 8).

(2) On January 8,.1972, at about 4:00 p.m., plaintiffs' decedents reported for work at Peabody Coal Company's Sinclair Mine, Drakesboro, Muhlenberg County, Kentucky. They were instructed by their immediate superior to take the 988 front end loader to the 4500 Pit to extricate a truck which had become mired in the mud. They apparently became confused and drove on several roads that did not lead to the 4500 Pit. At about 5:45 p.m. Robert Millard, an electrician, found skid marks on the TVA levee. He stopped his truck and saw the 988 front end loader lying on its top at the foot

of an embankment. He called for help and a crane was brought to the area and the front end loader was turned upright. Plaintiffs' decedents were removed from the cab and taken to Muhlenberg County Hospital, where they were pronounced dead on arrival (Depo. Troy Wills, Exhibit E, p. 4).

(3) It was impossible to determine who had been driving the front end loader at the time it overturned. The levee on which the accident occurred was used both by mine employees and TVA employees (Transcript of Evidence, Volume 1, pp. 141, 160, 165, 186, 197, 202; Transcript of Evidence, Volume 2, p. 63). The front end loader was used any place it was needed. It was not restricted to the shop area (T.E. Volume 1, pp. 167, 196, 205; T.E. Volume 2, p. 39).

(4) The front end loader was not equipped with a roll over protection structure (ROPS) (Stipulation, Para. 5).

(5) The roadway on which the accident occurred did not have berms or guardrails (Stipulation, Para. 6), and it was elevated 27 feet above the natural terrain (Wills Depo., Exhibit E, p. 5).

(6) On August 10, 1971, Federal Inspector Troy Wills issued a notice of violation of 30 C.F.R. Section 77.403 which requires ROPS on mobile equipment (Depo. Troy Wills, p. 12, Exhibit B-1). The notice directed that the violation "shall be totally abated by 8:00 a.m. on September 13, 1971" (Depo. Troy Wills, pp. 14 and 15, Exhibit B-1). On September 13, 1971, the violation was not abated but an extension was granted to October 13, 1971, because the company

stated that it had ordered ROPS (Depo. Troy Wills, p. 15). The copy of the order given by the company to Wills did not have the name of any company from which the ROPS were ordered (Depo. Troy Wills, p. 16, Exhibit C). Instead of granting the extension Wills could have ordered the equipment removed from service (Depo. Troy Wills, p. 19). Further extensions were granted to the company on October 13, 1971, November 10, 1971, December 9, 1971, and January 6, 1972 (Depo. Troy Wills, p. 20). On February 3, 1972, after the fatal accident, the equipment was ordered removed from service (Depo. Troy Wills, p. 20), and by February 16, 1972, all equipment at the mine had ROPS (Depo. Troy Wills, p. 22). From August 10, 1971, Wills knew that the order for ROPS had not been placed (Depo.

Troy Wills, pp. 25-26).

(7) The extensions referred to above were granted after company employees exhibited a "Mine Purchase Order" to the federal inspector. The purchase order was unsigned and was not directed to any vendor but the suggested vendor was designated "Best Place" (Depo. Troy Wills, Exhibit C).

(8) About 200 ROPS were sold by Whayne Supply Company (Whayne) between June 1, 1971, and December 31, 1971. The ROPS were delivered within 30 to 45 days from the date of the order (T.E. Volume 1, pp. 84-86). Whayne did not receive an order for ROPS from Peabody for its Sinclair Mine before the accident in question (T.E. Volume 1, p. 91).

(9) At the time of their deaths, Ronald Raymer's life expectancy was 52.55

years and David Gill's life expectancy was 46.95 years.

(10) Ronald Raymer's gross income in 1970 was $13,970.10 and in 1971 was $15,625.50, an average for the 2 years of $14,797.80 (Gwynith Raymer's Answer to Interrogatories No. 38, first set of Interrogatories propounded by defendant Feb. 20, 1974).

(11) Ronald Raymer had an anticipated work life of 45 years. Disregarding any inflationary factor or accretion in his earning capacity, he had an anticipated gross income during that period of $665,901.00.

(12) David Gill's gross income in 1970 was $14,394.32 and in 1971 was $14,840.02, for an average income for the 2 years of $14,617.17. (Marilyn Gill's Answer to Interrogatory No. 28, first set

of Interrogatories propounded by defendant February 15, 1974).

(13) David Gill had an anticipated work life of 39 years. Disregarding any inflationary factor or accretion in his earning capacity, he had an anticipated gross income during that period of $570,069.63.

(14) The total damage suffered by the plaintiff, Gwynith Raymer, for the destruction of Ronald Raymer's power to labor and earn money and his funeral expenses is $668,971. The total damage suffered by plaintiff, Marilyn Gill, by reason of the destruction of David Gill's power to labor and earn money and his funeral expenses is $571,726.38.

(15) The substantial factors which caused and brought about the deaths of Raymer and Gill were the absence of ROPS

and the absence of berms or guardrails on the elevated roadway at the scene of the accident.

(16) There is no evidence in the record to support the allegation of contributory negligence raised by the defendant.

CONCLUSIONS OF LAW

(1) The Court has jurisdiction over the parties and the subject matter of this action. Title 28 U.S.C. Section 1346(b).

(2) The liability of the defendant is to be determined according to the law of Kentucky. Title 28 U.S.C. Sections 1346(b) and 2674. See also Hess v. United States, 361 U.S. 314, 80 S.Ct. 341 (1960).

(3) The statute in effect on the date of the accident read in pertinent

part:

> "The Secretary shall, in accordance with the procedures set forth in this section, develop, promulgate, and revise, as may be appropriate, improved mandatory safety standards for the protection of life and the prevention of injuries in a coal mine, and shall, in accordance with the procedures set forth in this section, promulgate the mandatory health standards transmitted to him by the Secretary of Health, Education and Welfare." 30 U.S.C. Section 811(a).

> "Authorized representatives of the Secretary shall make frequent inspections and investigations in coal mines each year for the purpose of (1) obtaining, utilizing, and disseminating information relating to health and safety conditions, the causes of accidents and the causes of diseases and physical impairments originating in such mines, (2) gathering information with respect to mandatory health or safety standards, (3) determining whether an imminent danger exists, and (4) determining whether or not there is compliance with the mandatory health or safety standards or with any notice, order, or decision issued under this subchapter." 30 U.S.C. Section 813(a).

(4) The regulations adopted by the

Secretary may be found at 30 C.F.R.

Section 77.403a:

> "(a) All rubber-tired ... front end loaders ... that are used in surface coal mines ... shall be provided with rollover protective structures (hereinafter referred to as ROPS) ....
>
> * * * *
>
> (c)(4) [A]n authorized representative of the Secretary may require such mobile equipment to be equipped with ROPS at an earlier date when necessary to protect the operator of the equipment under the conditions in which the mobile equipment is, or will be operated. The authorized representative of the Scretary shall in writing advise the operator that the equipment shall be equipped with a ROPS and shall fix a time within which the operator shall provide and install the ROPS. If the ROPS is not provided and installed within the time fixed a notice shall be issued to the operator pursuant to Section 104 of the Act [30 U.S.C. Section 814].
>
> (c)(5) Nothing in this Section 77.403a shall preclude the issuance of a withdrawal order because of imminent danger."

30 C.F.R. 77.1605(k) reads as

follows: "Berms or guards shall be provided on the outer bank of elevated roadways."

(5) "Imminent danger" means the existence of any condition or practice in a coal mine which could reasonably be expected to cause death or serious physical harm before such condition or practice can be abated. 30 U.S.C. Section 802(j).

(6) In Kentucky when one who has undertaken to act discovers a dangerous condition he is under an affirmative duty to take protective action. In Haddad v. Louisville Gas & Electric Co., 449 S.W.2d 916 (1970), the Court sad at page 918:

> "Simply put, LG&E admits that it has the duty and authority to shut off a customer's gas appliance if it discovers a gas leak in the appliance's operation, but contends that it has no duty or any authority to shut off an appliance which does not evince a gas leak, even though

that appliance is found to be emitting highly dangerous carbon-monoxide fumes. We are of the opinion that LG&E did have the duty to do something protective when its employee discovered the highly dangerous condition of the furnace. Cf. Current v. Columbia Gas of Kentucky, Ky., 383 S.W.2d 139; Bruce v. Alley, Ky., 391 S.W.2d 678; Smith's Adm'x v. Middlesboro Electric Company, 164 Ky. 46, 174 S.W. 773, Ann.Cas.1917A, 1164. It is said in 138 A.L.R. 888:

> 'Whenever a gas company undertakes to make an inspection of pipes and appliances of a consumer of gas it must exercise care and diligence to make a thorough and adequate inspection and make the necessary repairs; or, in the alternative, shut off the supply of gas until the consumer has made the necessary repairs or replacements.' (Emphasis added.)

It will be observed that this principle does not impose on the company any initial duty to make an inspection of a consumer's appliances, or any duty to serve or police the appliance field. The stated duty grows out of an inspection which the company has chosen to make. We accept the principle as just stated and conclude that the trial court was in error in the conclusions of law upon which the directed verdict in favor of LG&E

was based." (Emphasis in original.)

(7) In Kentucky if a governmental agency owes no legal duty to a specific person there exists no basis for liability against the agency. Frankfort Variety, Inc. v. City of Frankfort, Ky., 552 S.W.2d 653 (1977).

(8) Congress has declared that:

> "(a) [T]he first priority and concern of all in the coal mining industry must be the health and safety of its most precious resource--the miner;
>
> * * * *
>
> (g) it is the purpose of this chapter (1) to establish interim mandatory health and safety standards and to direct the Secretary of Health, Education, and Welfare and the Secretary of the Interior to develop and promulgate improved mandatory health or safety standards to protect the health and safety of the Nation's coal miners; (2) to require that each operator of a coal mine and every miner in such mine comply with such standards; (3) to cooperate with, and provide assistance to, the States in the development and enforcement of

> effective State coal mine health and safety programs; and (4) to improve and expand, in cooperation with the States and the coal mining industry, research and development and training programs aimed at preventing coal mine accidents and occupationally caused diseases in the industry." 30 U.S.C. Section 801.

The Congressional mandate imposes a duty on the defendant to see that mine safety regulations are vigorously and meticulously enforced.

(9) If there is no underlying statutory duty to offer special protection to a citizen or a class of citizens there can be no basis for liability under general principles of tort law and the Federal Tort Claims Act. Clemente v. United States, 567 F.2d 1140 (1st Cir. 1977), cert. denied, 435 U.S. 1006, 98 S.Ct. 1876 (1978). Thus, if the actions of a government employee are discretionary, those actions are not within the

ambit of the Federal Tort Claims Act. On the other hand, if the employe is not involved in formulating government policy, but is engaged in actions and directing the actions of other employees in carrying out an already formulated policy, the discretionary exclusion is inapplicable. In Downs v. United States, 522 F.2d 990 (6th Cir. 1975), the Court said at page 997:

> "In this case, the FBI agents were not involved in formulating governmental policy. Rather, the chief agent was engaged in directing the actions of other Government agents in the handling of a particular situation. FBI hijacking policy was not being set as an ad hoc or exemplary matter since it had been formulated before this hijacking. Hijacking policy had previously been promulgated in the FBI Handbook and in a memorandum jointly issued by the Departments of Transportation and Justice. While the Government's guidelines for dealing with hijackings are secret and must remain so, we note that Special Agent O'Connor was not making policy

in responding to this particular situation."

(10) The Court is not unaware of the holding of Judge Gordon un Holland, Adm'x, Etc. v. United States, No. C 75-0158-O (W.D. Ky. 1978). The Court believes the factual situation in Holland may be distinguished. In Holland the alleged negligence of defendant's employees amounted to a passive failure to make inspections. In the case at bar, the Court finds that the affirmative act of perpetuating obviously hazardous conditions by granting unwarranted extensions to Peabody in the absence of any acceptable evidence that Peabody could not comply with the regulations amounts to actionable negligence for which defendant is liable.

(11) The measure of damages for wrongful death in Kentucky is the

destruction of the decedent's power to labor and earn money. This does not mean that the measure of damages is the destruction of his employment opportunities in his particular trade or profession. In Roland v. Beckham, Ky., 408 S.W.2d 628 (1966), the Court said at page 635:

> "As noted, our rule of damages in such cases is the destruction of the power to earn money--not the destruction of decedent's income from the particular work in which he was engaged at the time of the wrongful death." (Emphasis in original.)

This rule has been adopted in this Circuit. See Amerco Marketing Co. of Memphis, Inc. v. Myers, 494 F.2d 904, 913 (6th Cir. 1974).

(12) Plaintiff, Gwynith Raymer, Administratrix of the Estate of Ronald Raymer, Deceased, is entitled to recover of the defendant, United States of

America, the sum of $668,971.00, and the plaintiff, Marilyn Gill, Administratrix of the Estate of David Gill, is entitled to recover from the defendant, United States of America, the sum of $571,726.38, and a Judgment in accordance with these findings and conclusions has been entered this date.

This 19th day of October, 1979.

/s/ Thomas A. Ballentine, Jr.
United States District Judge

NO. 80-3033
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

GWYNITH RAYMER, Administratrix of the Estate of Ronald Latney Raymer, Deceased and MARILYN GILL, Administratrix of the Estate of David R. Gill, Deceased

Plaintiffs-Appellees

v. O R D E R

UNITED STATES OF AMERICA

Defendant-Appellant

Filed November 4, 1981

BEFORE: EDWARDS, Chief Judge: LIVELY and KEITH, Circuit Judges.

Upon receipt and consideration of the petition for rehearing filed herein by the plaintiffs-appellees the court concludes that it did not overlook or misapprehend points of fact and law in the decision in this case which was filed on October 9, 1981.

The petition for rehearing is denied.

ENTERED BY ORDER OF THE COURT

/s/ John P. Hehman, Clerk

Opposition

Supreme Court, U.S.
FILED
MAR 31 1982
ALEXANDER L. STEVAS
CLERK

No. 81-1409

In the Supreme Court of the United States

OCTOBER TERM, 1981

GWYNITH RAYMER AND MARILYN GILL, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals correctly held that the United States is not liable under the Federal Tort Claims Act, 28 U.S.C. 2671 *et seq.*, because the alleged negligence of employees of the Federal Bureau of Mines in granting a mine owner extensions of time within which to correct a safety violation is not an actionable tort under Kentucky state law.

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In the Supreme Court of the United States

OCTOBER TERM, 1981

No. 81-1409

GWYNITH RAYMER AND MARILYN GILL, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A37) is reported at 660 F. 2d 1136. The October 19, 1979, opinion of the district court (Pet. App. A38-A57) is reported at 482 F. Supp. 432. The June 22, 1978, opinion of the district court is reported at 455 F. Supp. 165.

JURISDICTION

The judgment of the court of appeals was entered on October 9, 1981. A petition for rehearing was denied on November 4, 1981 (Pet. App. A58). The petition for a writ of certiorari was filed on January 27, 1982. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. During the period relevant to this case, the Federal Coal Mine Health and Safety Act of 1969 (30 U.S.C. 801 *et seq.*) (Coal Mine Act) empowered the Secretary of the Interior, through authorized representatives,[1] to inspect mines to determine, *inter alia*, whether they complied with health and safety standards promulgated by the Secretary. 30 U.S.C. 813(a)(4); 30 C.F.R. Part 77 (1972). If an inspector discovered a violation of a safety standard that created no imminent danger, he was authorized to issue a notice of violation and to set a reasonable period for abatement. The inspector had discretion, however, to extend the period for compliance with the safety standard. 30 U.S.C. 814(b). One of the safety standards adopted in 1971 required mine operators to install "roll [over] protection" structures, *i.e.*, roll bars, on mobile equipment, including front-end loaders, "when necessary to protect the operator" of the equipment. 30 C.F.R. 77.403 (1972).

2. In August 1971, a Bureau of Mines inspector visited the Sinclair Mine of the Peabody Coal Company in Muhlenberg County, Kentucky. The inspector issued a Notice of Violation to Peabody because of the company's failure to provide roll-over protection equipment on certain mine vehicles deemed by him to be necessary to protect the operator (Pet. App. A40, A42). The inspector set September 13, 1971, as the date for compliance (*id.* at A42).

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[1] During the time pertinent to this case, the designated representatives were inspectors with the Bureau of Mines. The Bureau was subsequently renamed the Mining Enforcement and Safety Administration (MESA), still within the Department of the Interior. Effective March 9, 1978, MESA became the Mine Safety and Health Administration (MSHA), within the Department of Labor. See Federal Mine Safety and Health Amendments Act of 1977, Pub. L. No. 95-164, Sections 302(a), 307, 91 Stat. 1319, 1322, 29 U.S.C. (Supp. III) 557a, 30 U.S.C. (Supp. III) 801 note; *Holland* v. *United States*, 464 F. Supp. 117, 120 n.2 (W.D. Ky. 1978).

Prior to that date, the company placed an order for a roll-over protection kit, but it did not arrive by the compliance date (*id.* at A7, A43).[2] The compliance date was subsequently extended several times because the then-recent promulgation of the roll-over protection regulation had created a great demand for roll-over protection kits and surface mine owners throughout the nation, such as Peabody, were experiencing difficulty in obtaining such kits (*ibid.*). The final extension was granted by the Bureau on January 6, 1972 (*id.* at A4, A43).

On January 8, 1972, two Sinclair mine employees, Ronald Raymer and David Gill, were instructed by a supervisor to drive a Caterpillar 988 front-end loader to a distant part of the mine to help move a disabled vehicle (Pet. App. A2-A3, A40). They never arrived at their destination, and the loader was discovered overturned at a point 27 feet below an elevated levee road owned by the Tennessee Valley Authority, but used by Peabody employees (*id.* at A3). Both Raymer and Gill were fatally injured, apparently when the loader went over the edge of the levee and overturned (*id.* at A3, A40-A41). The loader had no roll-over protection equipment (*id.* at A42).

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[2]In June 1971, Peabody placed an order for roll-over protection equipment with Erb Equipment Company (C.A. App. 227-228, 556-561). ("C.A. App." refers to the appendix filed in the court of appeals.) Erb then placed a purchase order with its manufacturer, and delivery of the equipment to the mine was scheduled for early November 1971 (C.A. App. 229-233). The delivery schedule could not be met because of an industry-wide shortage of such equipment caused by the sudden nationwide demand in the wake of the new regulation (C.A. App. 40-45, 75-76, 91-93, 106-107, 116-117, 562-564).

Due to the difficulty in obtaining roll-over protection equipment, extensions of time for compliance with the recent requirement were commonplace at surface mines throughout the nation (C.A. App. 106-108, 608-611). The alternative under the Act (30 U.S.C. 814(b)) to such extensions was to prohibit all use of unprotected vehicles, likely resulting in the shutdown of surface coal mine operations (C.A. App. 40, 610-611).

3. Following the accident, petitioners, personal representatives of Raymer and Gill, brought these suits against the United States in the United States District Court for the Western District of Kentucky, alleging that they were entitled to recover damages under the Federal Tort Claims Act (28 U.S.C. 1346(b) and 2671 *et seq.*) for negligent inspection and enforcement of the Coal Mine Act by the Bureau (Pet. App. A3). Specifically, petitioners sought recovery on the ground that the Bureau was negligent in granting extensions of time to Peabody to install roll-over protection equipment and in failing to discover and issue a Notice of Violation for Peabody's failure to have a shoulder or guardrail on the elevated levee road (*id.* at A4-A5).

The district court initially found (Pet. App. A50-A52) that under Kentucky law, an individual who discovers a dangerous condition has an affirmative duty to take whatever action is necessary, including abatement of the activity creating the danger, to protect all who might be harmed by that condition. *Haddad* v. *Louisville Gas & Electric Co.*, 449 S.W.2d 916 (Ky. 1970). The court concluded that the inspector's decision to grant several "unwarranted extensions" of time "perpetuat[ed] obviously hazardous conditions" and therefore was actionable under state law (Pet. App. A55).[3] The court also rejected the government's claim that the decision of how best to enforce the Coal Mine Act was a discretionary function and therefore exempt from liability under the FTCA, 28 U.S.C. 2680(a) (Pet. App. A53-A55). Accordingly, the court entered judgment on behalf of petitioners and granted damages in the sum of

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[3]The district court recognized (Pet. App. A52) that under Kentucky law a governmental agency is not liable in tort unless the plaintiff can show the existence of a legal duty owing to him. *Frankfort Variety, Inc.* v. *City of Frankfort*, 552 S.W.2d 653 (Ky. 1977). The court found such a duty in 30 U.S.C. 801, which sets out the general policy of the Coal Mine Act and provides for inspections (Pet. App. A52-A53).

$668,971.00 to petitioner Raymer and $571,726.38 to petitioner Gill (*id.* at A56-A57).

4. The court of appeals reversed (Pet. App. A1-A37). It held that Kentucky law created a duty for inspectors to protect against a discovered hazardous condition only if the condition is *not* readily apparent (*id.* at A16-A20). Since the inspector simply noticed a problem that any person working in the mine could readily perceive, the court of appeals concluded that the cases relied upon by the district court were inapposite.[4]

The court then considered whether recovery was nonetheless available under any other theory of Kentucky common law. It held that Kentucky law recognized the "good Samaritan" doctrine, *i.e.*, liability for gratuitous acts done negligently thereby causing injury (see *Indian Towing Co.* v. *United States*, 350 U.S. 61 (1955)),[5] but found that

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[4]The court of appeals rejected, as irrelevant to determining the liability of the United States, Kentucky cases that denied liability against state government agencies for negligent inspections and failure to enforce state safety requirements effectively. The court reasoned (Pet. App. 23) that the FTCA subjects the United States to liability as if it were a "private individual" and not a governmental entity. 28 U.S.C. 2674.

[5]The court of appeals noted that although no Kentucky decisions had applied the "good Samaritan" doctrine as embodied in the *Restatement (Second) of Torts* § 324A (1965), the doctrine had been cited in state cases with apparent approval (Pet. App. A26-A27). Section 324A provides:

> One who undertakes, gratuitously or for consideration, to render services to another which he should recognize as necessary for the protection of a third person or his things, is subject to liability to the third person for physical harm resulting from his failure to exercise reasonable care to protect his undertaking, if
>
> (a) his failure to exercise reasonable care increases the risk of such harm, or
>
> (b) he has undertaken to perform a duty owed by the other to the third person, or
>
> (c) the harm is suffered because of reliance of the other or the third person upon the undertaking.

the conduct complained of in the instant case did not state a cause of action under that doctrine (Pet. App. A27-A33). Specifically, the court found that "reliance" by the injured party on the action of the alleged tortfeasor is an element of the "good Samaritan" cause of action. Petitioners could not prove reasonable reliance on the federal enforcement activities because the safety risk was readily apparent and the Coal Mine Act clearly placed responsibility for safety on the mine operator and employees. 30 U.S.C. 801(e) (Pet. App. A30-A31). Since Kentucky law supplied no basis of liability for the alleged negligence of the Bureau of Mines employees, the court of appeals ordered the complaint dismissed (*id.* at A37).

ARGUMENT

Petitioners argue (Pet. 8-12) that the court of appeals erred in holding that the actions of the Bureau of Mines were not tortious under Kentucky law. They do not contest the court of appeals' interpretation of *Haddad* as limited to discoveries of non-obvious dangers or of the "good Samaritan" doctrine as limited to situations where there has been reasonable reliance on the actions of the alleged tortfeasor.

Instead, petitioners claim (Pet. 13) that recovery should have been allowed under Kentucky's "per se negligence doctrine" discussed briefly in *Lomayestewa* v. *Our Lady of Mercy Hospital*, 589 S.W.2d 885 (Ky. 1979), which assertedly permits recovery in tort for any violation of an administrative regulation. In *Lomayestewa*, the Kentucky Supreme Court held a hospital liable for failure, in violation of an administrative regulation, to place a detention screen over windows in rooms occupied by mental patients. *Lomayestewa* merely indicates that the violation of some administrative regulations may support a finding of negligence; it certainly does not hold that every violation of every regulation constitutes an actionable tort in Kentucky. The case cannot be read in disregard of the special protective

relationship between a mental hospital and its patients, coupled with the specificity of the regulations that were the bases for the finding of liability in that case. *Id.* at 886-887.

Thus, even assuming that the district court was correct in concluding that Bureau of Mines inspectors failed to follow the Coal Mine Act and governing regulations, the issue remains whether the "negligence" of the inspectors is actionable under any theory of tort liability recognized by Kentucky. See, *e.g., Clemente* v. *United States*, 567 F. 2d 1140, 1149 (1st Cir. 1977), cert. denied, 435 U.S. 1006 (1978) ("It should be noted that even where specific behavior of federal employees is required by federal statute, liability to the beneficiaries of that statute may not be founded on the Federal Tort Claims Act if state law recognizes no comparable private liability"). Accord, *United Scottish Insurance Co.* v. *United States*, 614 F. 2d 188, 192-193 (9th Cir. 1979); *Gelley* v. *Astra Pharmaceutical Products, Inc.*, 610 F. 2d 558, 562-563 (8th Cir. 1979) (and cases cited therein); *Davis* v. *United States*, 536 F. 2d 758 (8th Cir. 1976), aff'g 395 F. Supp. 793, 795-796 (D. Neb. 1975).[6]

Absent any other clear basis for tort liability under state law,[7] federal courts generally rely, as the court of appeals

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[6]Because Kentucky does not recognize as a separate, actionable tort the mere act of violating an administrative regulation, there is no need to consider petitioners' additional, implicit argument that the Tort Claims Act would allow recovery for a tort as unusual as the "negligence per se" doctrine as defined by petitioners. We note, however, that it is doubtful that such an unusual "tort" would be actionable under the FTCA. As the Court stated in *Dalehite* v. *United States*, 346 U.S. 15, 28 (1953) (footnote omitted): "Uppermost in the collective mind of Congress were the ordinary common-law torts." See also *United Scottish Insurance Co.* v. *United States*, *supra*, 614 F. 2d at 192; *United States* v. *Smith*, 324 F. 2d 622, 624-625 (5th Cir. 1963).

[7]For example, the *Haddad* doctrine might have been a basis for tort liability if *Haddad* had not required that the dangerous condition be non-obvious to the injured party. See also page 9, *infra*. Petitioners do not contest the court of appeals' reading of *Haddad*, however.

did here, upon the catch-all "good Samaritan" doctrine, assuming it has been adopted by the state. *United Scottish Insurance Co.* v. *United States, supra,* 614 F. 2d at 194. Petitioners do not challenge the holding of the court of appeals that the "good Samaritan" doctrine does not apply to this case, and, except for a plainly extravagant reading of *Lomayestewa,* they offer no other tort theory recognized in Kentucky that would impose liability on a private person for conduct analogous to the government's in this case.[8]

Contrary to petitioners' assertion (Pet. 8-11), *Griffin* v. *United States,* 500 F. 2d 1059 (3d Cir. 1974), aff'g in pertinent part 351 F. Supp. 10 (E.D. Pa. 1972), is not to the contrary. Concededly, *Griffin* involved a violation of a federal regulation, but that is all that *Griffin* has in common

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[8]Petitioners also seem to argue that regardless of the Tort Claims Act, they were entitled to maintain a private cause of action for damages under the Coal Mine Act (Pet. 14-27). Initially, petitioners' argument is somewhat baffling because they are attempting to sue the United States for money damages and thus their rights under the Coal Mine Act are irrelevant; the Tort Claims Act is the exclusive remedy for such a claim (28 U.S.C. 2679(a)). Even if it were not, petitioners could not obtain money damages against the United States because the Coal Mine Act does not contain a waiver of sovereign immunity for such damages. See *United States* v. *Testan,* 424 U.S. 392 (1976).

Moreover, the holding of both courts below that no private right exists under the Act (Pet. App. A11-A12) is completely consistent with this Court's decisions concerning implied private rights of action. See, *e.g., California* v. *Sierra Club,* 451 U.S. 287, 292-298 (1981); *Transamerica Mortgage Advisors, Inc.* v. *Lewis,* 444 U.S. 11, 16-24 (1979). In addition, at least one appellate court has ruled specifically that the Coal Mine Act provides no private right of action. *Chaneyfield* v. *City of New York,* 525 F. 2d 1333 (2d Cir. 1975), cert. denied, 425 U.S. 912 (1976). See also *Russell* v. *Bartley,* 494 F. 2d 334 (6th Cir. 1974). Thus, even if the issue were relevant, it would not warrant review by this Court.

with this case.[9] In *Griffin* the district court held that Pennsylvania law recognized the tort of "invasion of an interest of another" as defined in the *Restatement (Second) of Torts* § 281(b) (1965) and that the action of the government in releasing a defective batch of polio vaccine satisfied all of the elements of that tort. 351 F. Supp. at 34. The court of appeals made no mention of the negligence per se doctrine; it simply upheld the district court's state law determinations. 500 F. 2d at 1069.

One of the elements of the tort in *Griffin* was that the tortfeasor must have acted negligently, and the district court relied upon the violation of a federal regulation as the basis for finding that the United States had been negligent. 351 F. Supp. at 34. But the finding of liability depended on the plaintiff being able to satisfy all of the elements of the tort. Thus, it was the existence of a specific tort recognized under state law that supplied the basis for the government's liability to the plaintiff in *Griffin*. In this case, as the court of appeals found, petitioners' claim simply fails to state a cause

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[9]The bulk of the court of appeals' opinion in *Griffin* is devoted to the issue of whether the challenged action of the government constituted a "discretionary function" and therefore was exempt from liability under the FTCA, 28 U.S.C. 2680(a). In light of its holding that no tort was committed, the court of appeals in this case did not consider the government's alternative argument that petitioners' suit is barred by the "discretionary function" exception.

We submit, however, that the "discretionary function" exception clearly applies to this suit. As the Third Circuit recognized in *Bernitsky* v. *United States*, 620 F. 2d 948, 955, cert. denied, 449 U.S. 870 (1980):

> [D]ecisions regarding issuance of a notice of violation, extensions of time, and orders of withdrawal must be made by the individual inspectors on the basis of their experience and judgment, and therefore fall within the scope of the discretionary function exception. They are "matters involving balancing of policy considerations in advancing the public interest."

of action under any theory of liability recognized by the Commonwealth of Kentucky. That determination of state law plainly does not warrant review by this Court.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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